Office-Supreme Court, U.S.
FILED
OCT 3 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTAKE WATER COMPANY,
Appellant,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Montana

---

BRIEF OPPOSING MOTIONS TO DISMISS

E. BARRETT PRETTYMAN, JR.*
MARY ANNE MASON
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4072
(202) 331-4685

PETER C. PAULY
LOBLE & PAULY
833 North Last Chance Gulch
P.O. Box 176
Helena, Montana 59624
(406) 442-0070

BOYD L. HENDERSON
ALEX T. WYCHE
TENNECO SYNFUELS COMPANY
Tenneco Building
P.O. Box 2511
Houston, Texas 77001
(713) 757-3078

STANLEY K. HATHAWAY
HATHAWAY, SPEIGHT & KUNZ
Suite 402
2424 Pioneer Avenue
Cheyenne, Wyoming 82001
(307) 634-7723

* Counsel of Record

Counsel for Appellant

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

11PP

TABLE OF AUTHORITIES

Cases: Page

Georgia Lumber Co. v. *Compania*, 323 U.S. 334 (1945) 4
Heflin v. *United States*, 358 U.S. 415 (1959) 3
Hoiness v. *United States*, 335 U.S. 297 (1948) 4
Reconstruction Finance Corp. v. *Prudence Group*, 311 U.S. 579 (1941) 4
Schacht v. *United States*, 398 U.S. 58 (1970) 3
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 3
United States v. *Ohio Power Co.*, 353 U.S. 98 (1957) 3

Statutes:

28 U.S.C. § 1253 (1982) 2
28 U.S.C. § 2101(b) (1982) 2, 3

Rules:

Sup. Ct. R. 10.2 2
Sup. Ct. R. 10.3 2
Sup. Ct. R. 28.1 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-131

INTAKE WATER COMPANY,
Appellant,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Montana

---

BRIEF OPPOSING MOTIONS TO DISMISS[1]

Notice of Appeal to this Court Was Timely Filed

The non-federal Appellees contend that the appeal in this case should be dismissed because Appellant failed to file any notice of appeal at all to this Court (Motion to Dismiss, p. 2). This is patently incorrect: a timely, joint notice of appeal to both courts was filed, as shown by the notice itself, which is attached as an Appendix hereto. Appellees' motion is therefore groundless and frivolous. It should be denied.

The notice of appeal was filed on May 25, 1984, in the United States District Court for the District of Montana. It put the District Court and the parties on notice that an appeal would be taken to the Court of Appeals, and a

---

[1] In a Supplemental Appendix to Jurisdictional Statement filed July 26, 1984, Appellant supplied a listing of parent companies, subsidiaries, and affiliates in compliance with Sup. Ct. R. 28.1.

second protective appeal would be taken to this Court.[2] There are six requirements of a notice of appeal to this Court under the applicable statute and Rule:

1. The notice must be filed within sixty days after the entry of the final order or judgment (28 U.S.C. § 2101(b) (1982)).
2. It should be filed in the District Court (Sup. Ct. R. 10.3).
3. It should specify the parties taking the appeal (Sup. Ct. R. 10.2).
4. It should designate the judgment or part thereof appealed from (*id.*).
5. It should give the date of the entry of judgment (*id.*).
6. It should specify the statute under which the appeal is taken (*id.*).

Appellant fully complied with all but the last of these six requirements. This oversight—which undoubtedly was the result of Appellant's conviction that 28 U.S.C. § 1253 (1982) did *not* confer jurisdiction on this Court—was completely cured at the time Appellant filed its Jurisdictional Statement, which repeatedly referred to 28 U.S.C. § 1253 (1982) and fully explained why it was inapplicable.

Under these circumstances, Appellant's notice of appeal was fully adequate to comply with the requirement for timely filing of such a notice. This Court has explicitly stated that its procedural rules are *not* jurisdic-

---

[2] Appellant is aware that in other similiar cases, parties have filed two notices of appeal—one for the Court of Appeals and one for this Court. Appellant believes that a single notice of appeal is preferable to separate notices of appeal for each court. A joint notice reduces the workload of the Clerk's office, simultaneously notifies all parties of both appeals, reduces the risk that parties will be confused as to the procedural status of the appeal, and eliminates the possibility that one of the two notices will be lost or overlooked.

tional. *Schacht* v. *United States*, 398 U.S. 58, 64 (1970).[3] The only jurisdictional requirement is timely filing of a notice of appeal within the period specified by statute at 28 U.S.C. § 2101(b) (1982). *Schacht* v. *United States*, 398 U.S. at 68 (Harlan, J., concurring). Appellant satisfied this requirement.

The non-federal Appellees suggest that the notice of appeal to this Court has not been filed because the case docket sheet shows that the District Court Clerk mailed the notice to the Ninth Circuit. But Appellant is not bound by what a Clerk's Office did or failed to do; abbreviated entries in a docket sheet do not determine the substance and content of the underlying documents. Here, the notice of appeal itself belies Appellees' contention that an appeal was not noted to this Court (*see* Appendix hereto).

The Solicitor General notes in a footnote that the notice of appeal "may" be deficient for lack of reference to the jurisdictional statute (Motion to Dismiss, p. 4 n.5). In appropriate circumstances, this Court will modify or waive technical compliance with its procedural rules.[4] More importantly, this Court disfavors dismissal of appeals raising constitutional questions because of "errors of practice." *United Public Workers* v. *Mitchell*, 330

---

[3] Accordingly, this Court has exercised discretion to waive requirements imposed by its own Rules. *See, e.g., United Public Workers v. Mitchell*, 330 U.S. 75, 86 (1947) (failure to docket an appeal within time limits imposed by rule does not prevent Court from hearing appeal); *United States* v. *Ohio Power Co.*, 353 U.S. 98, 99 (1957) (rule prohibiting petitions for rehearing out-of-time waived); *Heflin* v. *United States*, 358 U.S. 415, 418 n.7 (1959) (rule requiring filing of petition for writ of certiorari within 30 days from judgment waived).

[4] *United States* v. *Ohio Power Co.*, 353 U.S. at 99 ("We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules"); *Schacht* v. *United States*, 398 U.S. at 68 (Harlan, J., concurring).

U.S. at 86. Accordingly, minor procedural irregularities have often been disregarded in the interests of justice.[5]

Appellant's failure to identify the relevant jurisdictional statute is the only defect in its notice of appeal. Plainly, it is an insubstantial defect. Appellees have wholly failed to show that Appellant's timely notice of appeal is insufficient to invoke the jurisdiction of this Court. Further, none of the Appellees have addressed the underlying substantive issues in the case, nor have they moved to affirm the judgment below.

A difficulty arises if the Court dismisses this case because jurisdiction lies exclusively in the Court of Appeals. In doing so, the Court will thereupon be passing on the merits of one of the three questions presented in Appellant's Jurisdictional Statement. One way to avoid this problem would be for the Court simply to defer consideration of the appeal until the Court of Appeals has had an opportunity to pass upon its own jurisdiction.

Appellant strongly urges the Court, if it dismisses this appeal for lack of jurisdiction, to indicate—perhaps by citation to the cases principally relied upon by the Solicitor General—that it does so because exclusive jurisdiction lies in the Court of Appeals, and not because of the

---

[5] *Reconstruction Finance Corp.* v. *Prudence Group*, 311 U.S. 579, 582 (1941) (petitioner's failure to apply for an allowance of appeal when filing notice of appeal was not a substantial procedural irregularity where the scope of review was not altered and no question of good faith, dilatory tactics or frivolous appeals was raised). *Cf. Georgia Lumber Co.* v. *Compania*, 323 U.S. 334, 336 (1945) (the law does not require a precise form in which procedural requirements must be met). The Court could have been referring to the instant case when it said, "What appellant sought to have reviewed was plain. The failure to use words * * * [specifying] the date of the final decision, was as insubstantial as a misspelling of the words would have been, since the words used identified the rulings which were challenged and in no way altered the scope of the review." *Hoiness* v. *United States*, 335 U.S. 297, 301 (1948).

alleged failure to file a notice of appeal. (As we point out in our brief filed in the Ninth Circuit, we agree that the cases cited by the Solicitor General are sufficiently close to the situation here to control the question of jurisdiction.)

If the Court is satisfied that the Court of Appeals alone has jurisdiction, then we agree with the Solicitor General that the appeal should be dismissed on that ground.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
MARY ANNE MASON
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4072
(202) 331-4685

PETER C. PAULY
LOBLE & PAULY
833 North Last Chance Gulch
P.O. Box 176
Helena, Montana 59624
(406) 442-0070

BOYD L. HENDERSON
ALEX T. WYCHE
TENNECO SYNFUELS COMPANY
Tenneco Building
P.O. Box 2511
Houston, Texas 77001
(713) 757-3078

STANLEY K. HATHAWAY
HATHAWAY, SPEIGHT & KUNZ
Suite 402
2424 Pioneer Avenue
Cheyenne, Wyoming 82001
(307) 634-7723

* Counsel of Record

Counsel for Appellant

October 2, 1984

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

Civil Docket No. 1184

INTAKE WATER COMPANY,
a Delaware corporation,
Plaintiff-Appellant,

—vs—

YELLOWSTONE RIVER COMPACT COMMISSION; GARY FRITZ; GEORGE CHRISTOPULOS and L. GRADY MOORE, as members of the Yellowstone River Company Commission; MIKE GREELY, Attorney General of the State of Montana; VERNON FAHY, the State Engineer of the State of North Dakota; and the NORTH DAKOTA STATE WATER COMMISSION,
Defendants-Appellees.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Intake Water Company, the plaintiff above named, being in receipt of the Order of the District Court dated the 30th day of April, 1984, denying Plaintiff's Motion to Alter, Amend and/or Vacate Judgment filed herein pursuant to Rule 59(e), F.R.Civ.P., hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the 25th day of October, 1983, dismissing plaintiff's Second Amended Complaint for Declaratory Judgment and Application for Injunc-

tive Relief from Three-Judge Court, pursuant to Order of the District Court based on a Memorandum Opinion of the District Court, both dated the 11th day of October, 1983.

This is a partial appeal from that portion of the Judgment denying plaintiff's request for declaratory relief. No appeal is taken from that portion of the Judgment denying plaintiff's request for injunctive relief. Accordingly, plaintiff, as appellant, believes that jurisdiction lies in the Court of Appeals as a matter of right. 28 U.S.C. 1291 and Rules 3 and 4, F.R.App.P. *Cf. Heckler* v. *Edwards*, 52 U.S.L.W. 4373 (S.Ct. March 21, 1984). As a protective measure, however, plaintiff intends to file a timely jurisdictional statement in the United States Supreme Court with the request that it defer consideration of this case pending the disposition of this case in the Court of Appeals. The matter of appellate jurisdiction will be fully addressed in plaintiff's brief on the merits as appellant in the Court of Appeals.

DATED this 25th day of May, 1984.

LOBLE & PAULY, P.C.

By /s/ Peter C. Pauly
PETER C. PAULY
Attorneys for
Plaintiff-Appellant,
Intake Water Company,
a Delaware corporation

833 North Last Chance Gulch
P.O. Box 176
Helena, Montana 59624